Insolvency proceedings and foreign companies

Insights - 01/05/2020

Insolvency proceedings and foreign companies

English court's jurisdiction to wind up foreign companies

The English jurisdiction to wind up foreign companies is found pursuant to section 221 of the Insolvency Act, 1986, where foreign companies fall within the definition of 'unregistered companies' contained within section 220:

"*any association and any company, with the exception of a company registered under the Companies Act 2006 in any part of the United Kingdom*"

It is well established that the English court will only exercise its jurisdiction to wind up companies incorporated outside of England and Wales with caution. The classic test, emanating from **Re Real Estate Development Co [1991] BCLC 210**, is that English courts will only exercise their jurisdiction to wind up a foreign company where[1]:

1. There is a sufficient connection with England and Wales.
2. There is a reasonable possibility of benefit to those applying for the winding-up order
3. There is at least one person interested in the distribution of assets within the Court's jurisdiction

Therefore careful thought needs to be given to whether England and Wales is the most appropriate jurisdiction to launch costly legal proceedings. Below are two examples where the English Courts have found that England was not the proper jurisdiction. Accordingly these cases should be borne in mind when considering options in England as against companies who are incorporate elsewhere.

Refusal to Wind-Up a Foreign Company: Re Buccament Bay Limited [2014] EWHC 3130 (Ch)

In Re Buccament Bay Limited, the issue was whether the Court would exercise its jurisdiction over two companies incorporated in St Vincent and the Grenadines ("SVG") rather than England and Wales ("E&W").

The subject matter debts arose in relation to land in SVG governed by SVG law, where all assets and key management were located. Conversely, the contract was formally signed in E&W, funds were routed to the Caribbean through an E&W group company, and 30 staff were employed in E&W.

The Judge found that in the circumstances limbs (i) and (iii) of the **Re Real Estate Development Co** test were satisfied. However, given the adequacy of the SVG liquidation procedure and undisputed evidence that an English liquidator would face difficulties gaining control of assets, there was no reasonable possibility that the petitioners would derive a benefit from a winding-up in E&W.

The Judge further cited authority to the effect that the E&W Court should be cautious about assuming jurisdiction over foreign matters even where it had 'jurisdiction' in a broad sense. Given the flimsiness of the connection, the petition might have been expected to be dismissed under (i), the 'sufficiency of connection' requirement.

The lesson to be learned from this case is that Insolvency Practitioners and lawyers should exercise caution when looking at winding up a foreign company in E&W. Careful thought should be given to whether or not a clear benefit to winding up in E&W can be demonstrated; and whether or not there are assets in E&W will be a significant factor. If no clear benefit can be demonstrated, it may be that winding up in the jurisdiction of incorporation is the safer route.

English Administration of BVI Company Declared Invalid on Application of BVI Liquidator: MacKellar v Griffin and Anr [2014] EWHC 2644 (Ch)

The appointment in E&W of an administrator over a BVI company whose centre of main interest ("COMI") was not England and Wales was invalid, and the High Court of E&W was prepared to make a declaration to that effect in support of a Virgin Islands liquidator.

The lender under a charge (the "Chargee") of almost the entire assets (an office block in England and Wales) of a BVI company (the "Company") appointed administrators ("the Administrators") in England and Wales. The Administrators sold the property, leaving a large shortfall for the Chargee. A BVI liquidator of the Company applied to the High Court of England and Wales and was granted:

i.

recognition of the BVI liquidation under the Cross Border Insolvency Regulations 2006 as foreign main proceedings; and

ii. a declaration that the Administrators' appointment had been invalid, on the basis that the Company's COMI had not been in the UK as required by the Insolvency Act 1986 (E&W) and the EC Regulation on Insolvency Proceedings.

The English High Court held, with relation to arguments raised that the COMI was in England, that Asset location was of no particular weight. Further, agents operating in the jurisdiction are only relevant insofar as they discharge "head office" functions (of which there was no evidence in this case) and not just limited commercial activities. The Administrators further argued that the shortfall following sale meant there was no loss to the Company, which rendered the Liquidator's declaration of no practical utility. On this point the Judge stated that a Liquidator was entitled to have the validity of the Administrators' appointment determined and, while not policing them, the Court had its own interest in ensuring administrators were properly appointed.

Conclusion

The above cases demonstrate the caution which should be applied by Insolvency Practitioners and lawyers when considering either the winding up of companies not incorporated in the jurisdiction making the order, or the appointment of English administrators over a foreign company. Failure to exercise such caution can store up potential problems which might only emerge a considerable distance down the line.

---

[1] *Stocznia Gdanska SA v Latreefers Inc (No 2) [1998] EWHC 1203 (Comm)*, applying *Re Real Estate Development Co [1991] BCLC 210*.

[1] *Stocznia Gdanska SA v Latreefers Inc (No 2) [1998] EWHC 1203 (Comm)*, applying *Re Real Estate Development Co [1991] BCLC 210*.

About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

Disclaimer

This client briefing has been prepared for clients and professional associates of Ogier. The information and expressions of opinion which it contains are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

Regulatory information can be found under Legal Notice

Key Contacts

Marc Kish

Partner

Cayman Islands

E: marc.kish@ogier.com

T: +1 345 815 1790

Brian Lacy

Partner

British Virgin Islands

Jersey

E: brian.lacy@ogier.com

T: +44 1534 514493

Related Services

Dispute Resolution

Related Sectors

Restructuring and Insolvency